

DEC 12 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

XIAOFENG XU,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-74455

Agency No. A95-876-851

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted December 5, 2005^{**}

Before: GOODWIN, W. FLETCHER and FISHER, Circuit Judges.

Xiaofeng Xu, a native and citizen of China, petitions for review of the Board of Immigration Appeals' ("BIA") decision dismissing her appeal from an immigration judge's ("IJ") order denying her motion to reopen removal

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

proceedings conducted in absentia. We have jurisdiction pursuant to 8 U.S.C. § 1252. “Where, as here, the BIA adopts the IJ’s decision while adding its own reasons, we review both decisions.” *See Kataria v. INS*, 232 F.3d 1107, 1112 (9th Cir. 2000). We review for abuse of discretion, *see Ordonez v. INS*, 345 F.3d 777, 782 (9th Cir. 2003), and we grant the petition for review.

The IJ abused his discretion in concluding that Xu’s affidavit was not credible, because the facts presented in her affidavit are not inherently unbelievable and the IJ did not give Xu an opportunity to explain. *See Ordonez*, 345 F.3d at 786 (recognizing that the agency violates an alien’s due process rights when it makes a sua sponte adverse credibility determination).

Because we conclude that the IJ improperly found Xu incredible, and we remand for consideration of her ineffective assistance of counsel claim, we need not address her remaining challenges to the agency’s decision.

PETITION FOR REVIEW GRANTED; REMANDED.